

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ARNOLD Minors.

UNPUBLISHED

May 20, 2014

No. 317261

Delta Circuit Court

Family Division

LC Nos. 13-000733-NA

13-000734-NA

Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Respondent-mother appeals by right the order terminating her parental rights to her two minor children pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), and (j). We affirm.

The gist of the petition against respondent was that she failed to protect one of the children from a physically-abusive and mentally-unstable father relative to incidents in 2012 and 2013, and that she lacked the capacity to protect the children from potential future harm. There was uncontroverted evidence, and it was accepted by all, that the father physically abused the child in the 2012 incident, inflicting severe injuries through the use of a wooden paddle; he pled guilty to child abuse. And the evidence was overwhelming that he again abused the same child in the 2013 incident.

Respondent presents extremely cursory arguments on appeal, the first of which is that the trial court erred in taking jurisdiction over the children where a statutory basis had not been established at the jury trial on adjudication. Despite this broadly-stated argument, when one examines the actual substance of respondent's argument in the body of the brief, she simply contends that it was error to admit evidence of a 2007 incident in which the father pointed a gun at respondent and then discharged it at a wedding picture sitting on the floor. Respondent maintains that the incident was irrelevant to any kind of abuse or neglect for purposes of establishing jurisdiction under MCL 712A.2(b), considering that the incident predated the birth of both children. Respondent contends that the admission of this "stale" evidence improperly clouded the jury's perception and evaluation of the 2012 and 2013 incidents, blowing them out of proportion and poisoning the atmosphere for a fair trial.

At the start of the trial, respondent stipulated and affirmatively expressed that she had no objection to the admission of numerous exhibits into evidence. One of these exhibits was a medical record regarding the father. That document referenced a conversation with the county prosecutor and contained the following statement, "He [father] has had p[r]evious run-ins with

authorities including discharging a firearm next to his wife's head during a domestic argument." The trial court provided all of the exhibits to the jury. Also, before any testimony was offered on the subject, petitioner's counsel and counsel for respondent herself spoke of the 2007 firearm-discharge incident in their opening statements, with respondent explaining how the father was not being treated nor medicated for his mental illness at the time. On this record, the argument concerning the admissibility of evidence regarding the 2007 shooting was waived. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Even if not waived, the evidence of the 2007 firearm-discharge incident was relevant to showing the father's unstable mental condition and his capacity for violent conduct,¹ was relevant to showing respondent's knowledge or awareness of the father's mental condition and violent ways, and was relevant to showing respondent's tendency or willingness to remain in a dangerous relationship despite knowledge of the father's violent proclivities. MRE 401 and 402. And the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Moreover, assuming plain-error analysis as to this issue, which, if not waived was certainly forfeited and unpreserved, we cannot conclude that respondent's substantial rights were affected, i.e., that she was prejudiced. See *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

To the extent that respondent is making a separate argument challenging the exercise of jurisdiction, we reject it. "In order to find that a child comes within the court's jurisdiction, at least one statutory ground for jurisdiction contained in MCL 712A.2(b) must be proven, either at trial or by plea." *In re SLH, AJH, & VAH*, 277 Mich App 662, 669; 747 NW2d 547 (2008); see also *In re Hatcher*, 443 Mich 426, 435; 505 NW2d 834 (1993) (purpose of adjudication trial is to determine whether the child was neglected within the meaning of MCL 712A.2[b]). MCL 712A.2(b)(2) provides for jurisdiction when the child's home environment, due to neglect or criminality, is an unfit place to live. The allegations in a petition must be proven by a preponderance of the evidence. MCR 3.972(C)(1); MCR 3.977(E)(2); *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). Here, respondent has not established a basis to disturb the jury's verdict on jurisdiction. The evidence presented at trial established that the father physically abused the child in both the 2012 and 2013 incidents. Further, evidence of neglect by respondent during the 2013 incident was also presented, where she effectively tried to make excuses for the father all the way up through the trial itself,² and where she had known about the previous abuse in 2012 and the father's mental instability when not on his medications. Indeed, there was evidence presented that respondent, at the time of the 2012 incident of abuse, had told a child welfare specialist that the abused child was generally fearful of the father and that respondent "had seen him push [the child] down in the past and that [the father] had taken [the child's] head and pushed it down towards the floor." In further regard to the 2012 incident, the father testified that he had essentially begged respondent to take the abused child with her on errands because he could not handle both children and was off his medications, but she declined

¹ The jury trial concerned both respondent and the father.

² When asked whether the father had used anything to discipline the children after the 2012 incident, including objects or even his hands and feet, respondent replied, "Absolutely nothing."

and the abuse occurred after respondent left the home. The jury could reasonably find that the grounds under MCL 712A.2(b) were proven by a preponderance of the evidence.

Respondent next presents cursory, undeveloped arguments that the statutory bases for termination were not proven by clear and convincing evidence and that the trial court clearly erred in ruling that termination was in the children's best interests. If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proven by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). In applying the clear error standard in parental termination cases, "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

We do note, and wish to make absolutely clear, that there was no evidence whatsoever indicating that respondent had ever physically injured the children; therefore, MCL 712A.19b(3)(b)(i) should not have been relied upon in terminating respondent's parental rights. It would appear that the provision was meant to apply to the father. However, with respect to MCL 712A.19b(3)(b)(ii), there was sufficient evidence showing that respondent had the opportunity to prevent the physical abuse of the child by the father and failed to protect him with respect to the 2013 incident of abuse. The same can be said even as to the 2012 abuse incident, given respondent's remarks to the child welfare worker at the time of the 2012 incident, alluded to above, and the father's testimony about not leaving both children at home with him. MCL 712A.19b(3)(b)(ii) also requires contemplation of whether there was a "reasonable likelihood that the child[ren] will suffer injury or abuse in the foreseeable future if placed in the parent's home." Respondent admitted during the dispositional hearing on termination that she had essentially lied under oath at the adjudication trial, agreeing with petitioner that the father had likely caused the 2013 injuries to the child. Respondent stated that she was in process of divorcing the father, and there was reference to the father being in a federal prison.³ However, there was evidence which showed that in 2012 respondent had initially pursued divorce from the father after the incident of abuse, yet she allowed him to later reenter her life and her children's lives; thereafter, he abused the child once again. In addition, respondent initially remained with the father even after the 2013 incident. Given this evidence, the trial court was properly suspect of her current claims to separate herself and the children from the father. And while the father was incarcerated, there was no indication that he would be unable to return and potentially reunite with respondent sometime in the foreseeable future. Indeed, we have no information

³ A motion filed by the father indicated that he was being held on federal firearm charges.

whether the father even remains incarcerated at this time. Moreover, the history of this case reflects respondent's failure and inability to place the safety of her children as the highest priority, thereby calling into question her ability to properly care for the children even absent the father's presence.

Respondent's argument under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood of harm if child returned to the home) is simply that those grounds were not satisfied because the father is now absent due to his imprisonment. For the reasons stated in the preceding paragraph, we reject this argument. Respondent indicates, once again in cursory fashion, that DHS "has never" attempted to provide reunification services. However, the petitions filed in this case provided that reunification efforts had been made in the past, listing a number of agencies involved in those efforts. There were previous referrals relative to assisting respondent in establishing her own household, to helping her initiate a divorce action, to assisting her in receiving Medicaid for the children, and there was a referral to the Alliance Against Violence and Abuse. It would also appear that no reunification efforts were even necessary given the severe physical abuse. See MCL 712A.19a(2)(a); MCL 722.638(1)(a)(iii).

Finally, given the circumstances elaborated on above, we cannot conclude that the trial court clearly erred in finding that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly